United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1019

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1019

UNITED STATES OF AMERICA,

Appellee,

—*against*—

DOMINIQUE ORSINI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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FOR THE SECOND CIRCUIT

Docket No. 77-1019

UNITED STATES OF AMERICA,

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—against—

DOMINIQUE ORSINI,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Dominique Orsini appeals from a judgment of the United States District Court for the Eastern District of New York (Henry Bramwell, *J.*) entered on December 20, 1976. The judgment convicted Orsini, following his plea of guilty to a single count indictment (74 Cr. 492), of conspiring to import into the United States and to conceal and sell large quantities of heroin and cocaine, in violation of Title 21, United States Code, Sections 173 and 174. Orsini was sentenced to ten years imprisonment and is now serving his sentence.

On appeal, Orsini claims that the district court erred in denying his motion to dismiss the indictment on the grounds that his presence in the jurisdiction was obtained in violation of due process. *United States* v.

Toscanino, 500 F.2d 267, *rehearing en banc denied*, 504 F.2d 1380 (2d Cir. 1974). He also contends that the court erroneously quashed his subpoena to Anthony Marro, a reporter for *Newsweek* Magazine.[1]

Statement of Facts

1. Orsini's arrest and expulsion from Senegal

Orsini was indicted in the Eastern District of New York in July of 1974, and a warrant was issued for his arrest. He remained a fugitive until August 25, 1975, when he was brought into the Eastern District from the Republic of Senegal and arraigned on the indictment. Shortly thereafter, he moved to dismiss the indictment on the grounds that his presence in the Eastern District had been obtained by means violative of due process. In response to the motion, the district court ordered a *Toscanino* hearing, *United States* v. *Orsini*, 402 F. Supp. 1218 (E.D.N.Y. 1975), which revealed the following facts:[2]

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[1] In pleading guilty, by agreement with the Government and the consent of the court, Orsini reserved the right to appeal the denial of the *Toscanino* motion. *See, United States* v. *Faruolo*, 506 F.2d 490, 491 n.2 (2d Cir. 1974).

[2] Testimony in the hearing was taken on November 20 and 21, 1975, January 15, 1976, July 26, 1976, and September 20 and 21, 1976. The transcripts of the proceedings of November 20th and 21st are consecutively numbered 1-240a. The January 15th transcript is numbered 1-69, while the July 26th transcript is numbered 1-77. The transcripts of the proceedings of September 20th and 21st are consecutively numbered 1-140a.

The following designations are used herein for pages of the transcript:

"A"—transcripts of November 20 and 21, 1975;
"B"—transcript of January 15, 1976;
"C"—transcript of July 26, 1976;
"D"—transcripts of September 20 and 21, 1976.

Thus, "A 134" refers to page 134 of the consecutively numbered transcripts of November 20 and 21, 1975, while "C6" refers to page 6 of the transcript of July 26, 1976.

In late July of 1975, Rhyn Tryal, the special agent in charge of the Drug Enforcement Administration (DEA) office in Buenos Aires, Argentina, learned that Orsini, a French citizen, would soon be flying from Argentina to France. Tryal communicated the information to the DEA in Washington and New York. He also advised that, enroute to France, the plane on which Orsini would be travelling would be landing for a stopover at Dakar, Senegal, on the west coast of Africa (A. 134-135).

Acting on Tryal's information, DEA and State Department officials began their efforts to have Orsini apprehended in Senegal. On July 30, 1975, Louis Fields, an assistant legal advisor in the State Department, cabled the United States Embassy in Dakar. Fields notified the Embassy of Orsini's anticipated arrival in Senegal and instructed that the Senegalese be requested to provisionally arrest Orsini for purposes of either extradition to the United States or expulsion from Senegal (A. 34-35; C. 6-7, 27). Fields' request was promptly transmitted to the Senegalese (C. 6-7, 32). Thereafter, on August 6, 1975, the Senegalese Ministry of Foreign Affairs confirmed to the United States Embassy in Dakar that the Government of Senegal would cooperate with the American request and would have Orsini arrested (C. 34-35).[3]

Early on the morning of August 7, 1975, Orsini and his wife boarded the flight from Buenos Aires to Nice, France. Also on the plane, but unknown to Orsini, was Agent Tryal, who was there to identify Orsini to the Senegalese during the stopover in Dakar (A. 135). Prior to the departure from Buenos Aires, Tryal had his office

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[3] The request that there be *either* extradition *or* an expulsion was made necessary by the fact that there is no extradition treaty between Senegal and the United States (C. 36-37).

notify DEA in Washington and New York that Orsini was leaving Argentina (A. 135-136).

Several hours later, the Buenos Aires-Nice flight arrived in Senegal for the stopover, and Orsini left the aircraft, closely followed by Agent Tryal (A. 136, 162). Inside the terminal building, Tryal was paged by Allen Davis, the Deputy Chief of Mission of the American Embassy in Dakar. Davis had come to the airport after receiving word from Washington the previous day that Orsini and Tryal would be on the flight. Accompanying him were Senegalese police officials (A. 136-137; C. 7-8). After identifying himself to Davis, Agent Tryal pointed out Orsini, after which Davis spoke briefly to the Senegalese and Orsini was arrested and taken from the airport (A. 137; C. 8-9).[4]

Approximately two weeks after Orsini's arrest, on August 21, 1975, the Senegalese Government notified the American Embassy in Dakar that it wished to have documentation pertaining to the extradition of Orsini. Perceiving the request to be urgent, Deputy Chief of Mission Davis informed the State Department that the papers should be brought directly to Senegal, rather than being sent via the regular diplomatic pouch. He also requested that the person who brought the papers have legal experience and that he be accompanied by someone who could take custody of Orsini if the need arose (C. 10-11).

In response to Davis' request, Legal Advisor Fields was immediately sent from the United States to Senegal with the extradition papers. Travelling with him was

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[4] Tryal returned to Argentina about one week later without either seeing Orsini again or having any further contact with the Senegalese Government (A. 137-139).

DEA Agent Anthony Bocchichio of the Eastern District's narcotics conspiracy unit (A. 28-29, 232-233).

Fields and Bocchichio arrived in Dakar on the afternoon of August 22, 1975. After being met at the airport and checking into their hotel, they went with Deputy Chief of Mission Davis and another Embassy official to the Senegalese Foreign Ministry. There, the four were met and escorted to the Ministry of Justice, where they conferred with the Acting Minister of Justice, a Mr. Mbacke. Present with the Acting Minister was Sadibou Ndiaye, the Director of the Judiciary Police and also the Senegalese Interpol representative (A. 29-31; C. 11-12).

At the meeting, Davis delivered to the Senegalese the extradition papers which had been brought to Dakar. He also again orally requested that Orsini be turned over to American custody (A. 36; C. 12). In response, the Americans were informed that Orsini's case was to be heard by the Senegalese court on the following day and that the Embassy would be notified when the matter had been decided (C. 13). The Acting Minister also advised that it was possible that Orsini would be expelled instead of extradicted (C. 60).

The next day, August 23rd, Deputy Chief of Mission Davis received a telephone call from Sadibou Ndiaye. Ndiaye asked if the Embassy could take custody of Orsini immediately. Davis replied that the United States would prefer to have the Senegalese retain custody until the next scheduled flight to New York, which was on Monday, August 25th, and on which Davis had already reserved seats. That afternoon, Ndiaye called back and advised that the Senegalese would maintain custody of Orsini until Monday, August 25th, at which time he would be

turned over to the Americans for the flight to the United States (A. 38-40; C. 13-15).[5]

At approximately 3:30 on the morning of Monday, August 25, 1975, Legal Advisor Fields, Agent Bocchichio and DEA Agent James Collier[6] were driven to the Dakar airport (A. 43, 184, 236). Accompanying them, in a separate car, was Allen Davis (C. 17). At the airport the four waited for the Pan American flight which would be taking Fields, Bocchichio, Collier and Orsini to the United States (C. 18).

After the plane had arrived, and the Dakar passengers had gotten on board, a Senegalese police official directed Fields, Davis, Bocchichio and Collier out of the terminal building to an area beside the staircase to the first-class entryway to the aircraft (C. 18). After waiting there for a few moments, the group saw proceeding towards the plane an automobile followed by a van. The motorcade stopped beside the aircraft, and Sadibou Ndiaye emerged from the lead car. Almost immediately, the rear door of the van was opened, and out lunged a group of Senegalese policemen trying to restrain Orsini, who was shouting and attempting to free himself (A.

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[5] The Senegalese court denied the request of the United States for extradition and ordered Orsini released from extradition proceedings. Immediately following this order, the Senegalese Government placed Orsini in custody and held him until he was expelled on August 25, 1975. *United States* v. *Orsini*, 424 F. Supp. 229, 234 (E.D.N.Y. 1976).

[6] Upon learning that Orsini would be expelled, Fields requested that a French speaking agent be sent to Senegal to assist Bocchichio in taking custody of Orsini. Agent Collier was dispatched from the DEA office in Paris and arrived in Dakar on August 24th. In Dakar, he shared the same hotel room in which Fields and Bocchichio were staying (A. 41-42, 54-55, 181-183).

44-45, 184-185, 236-237; C. 19). Eventually, with the assistance of Agent Bocchichio, who placed handcuffs on Orsini, the Senegalese were able to take their struggling prisoner up the stairway, through the first-class section and into the rear of the aircraft, where Orsini was seated between Bocchichio and Collier (A. 45-46, 186-187, 237; C. 20). As the agents and the Senegalese police were taking Orsini into the plane, Sadibou Ndiaye told Davis that when the police had gone to the jail and picked up Orsini, he had struggled with them and in the course of the scuffle had cut his wrist. Orsini had been taken to the hospital, however, Ndiaye related, and the wound had been treated (C. 22).

Shortly after Orsini had been brought into the aircraft, Louis Fields was summoned to the forward cabin. At this point, he was told by the Pan American captain that the plane could not safely leave with Orsini in such an agitated state and that the flight would only leave if Orsini was sedated (A. 46-47). Following a brief conference with Allen Davis, one of the Embassy aides was sent to find a doctor. The aide returned about twenty-five minutes later, bringing with him an American Peace Corps physician, Dr. Albert Green. Inside the aircraft, the doctor gave Orsini—with his consent—an injection of valium, a mild tranquilizer. The doctor explained that the shot would probably induce sleep for about two hours and that after he awoke, Orsini would be more relaxed and under less tension. Moments later, the doctor left the plane, and the flight took off for New York (A. 48-49, 52-54, 192-194, 239; C. 20-22).

Once the plane was in the air, Agent Collier read Orsini his *Miranda* warnings in French, after which he had a conversation with Orsini, also in French (A. 195, 239). Orsini explained that he had sustained the wound on his wrist earlier that morning when the police had

come to his cell to take him to the airport. He stated that he had been told the night before that he would not be picked up until about 9:00 in the morning. Orsini said that he thus became frightened when the police came for him at 3:30 A.M. He related that it was at this point, as he was backing away from the officers towards the rear of his cell, that he slashed his wrist across some jagged glass in a broken window. Orsini said that he was given shots for the wound and that it was treated. Orsini also stated that while he was in the Dakar jail, he was fed rice and fish and given fruit juices to drink. He added that he was treated neither better nor worse than the other prisoners whom he saw (A. 195-196, 198).

Agent Collier further testified that during the flight Orsini never said that he was beaten by the Senegalese or anyone else. Moreover, approximately one hour before landing in New York, the agents took Orsini to the bathroom so that he could shave and wash and apply deodorant. In the bathroom, Orsini removed his shirt, and Collier and Bocchichio observed no marks or bruises on his stomach, back or chest (A. 198-199, 239-240).

In addition, Messrs. Fields, Davis, Tryal, Bocchichio and Collier denied paying any bribes to the Senegalese or contacting the Senegalese to persuade or pressure them to turn Orsini over to American custody (A. 42, 61, 95-96; C. 68-69; A. 138-139, 145, 147, 210, 235-238). Finally, no protest was lodged by either the Republic of Senegal or France in connection with the expulsion of Orsini from Senegal (A. 60; C. 69-70).

Orsini took the stand in his own behalf at the hearing. Contradicting what he had told Agent Collier on the plane, he testified that after the decision of the Senegalese court denying extradition, he was kidnapped by

Senegalese police, aided by two Americans. He also stated that the Americans and Senegalese beat him in his cell before taking him to the airport and that he was also beaten by the Senegalese in the van on the way to the airport. Orsini further testified that he heard English coming from the cab of the van and that at one point he was told: "The Americans are managing this affair." (D. 87, 83-89). In addition, the defense sought to bolster Orsini's story with the deposition of one Marie Appoline Serge, an individual who claimed to have seen Orsini being beaten by Senegalese police outside the Central Police Station in Dakar, with an American car with diplomatic plates standing nearby. At the conclusion of the hearing, however, the district court stated that it was discrediting and discounting the testimony of Orsini and also the Serge deposition. *United States* v. *Orsini*, 424 F. Supp. 229, 236 (E.D.N.Y. 1976).

2. The findings of the district court

Upon completion of the *Toscanino* hearing, the district court made extensive findings of fact and conclusions of law. The facts found by the court were those described above, revealed through the testimony of Messrs. Fields, Davis, Tryal, Bocchichio and Collier. *United States* v. *Toscanino*, *supra*, 424 F. Supp. at 233-234. Applying the controlling legal principles to these facts, the court reached the following conclusions (*id.* at 235):

> 1. The arrest and subsequent expulsion of the defendant Dominique Orsini from Senegal were sovereign and legitimate acts of the Senegalese Government.
>
> 2. Mr. Orsini was not beaten, tortured, or subjected to inhumane treatment by American agents or officials. Moreover, there is no evidence

to indicate any American involvement in any alleged assault on Mr. Orsini by Senegalese or other foreign agents or policemen. Furthermore, if Mr. Orsini was assaulted, this Court finds that American agents or officials had no knowledge of said alleged assault. Finally, the Court finds that Mr. Orsini was neither tortured nor subjected to inhumane treatment by anyone, whether American, Senegalese, or other foreign national agents.

3. The dosage of valium administered to Mr. Orsini was given with his express consent and only after the aircraft's pilot refused to depart unless Mr. Orsini was sedated. The injection was given by a licensed physician.

4. There is nothing in the record of the evidentiary hearing conducted by this Court to support a finding of American governmental conduct sufficiently shocking to reach the level of a violation of Mr. Orsini's due process rights.

5. There has been no protest lodged by the government of Senegal with reference to the departure of Mr. Orsini from Senegal to the United States.

After reaching these conclusions, the district court denied in all respects Orsini's motion to dismiss the indictment.

3. The Marro subpoena

On August 30, 1976, near the end of the hearing, the district court, on application of Orsini, issued a subpoena duces tecum to Anthony Marro, a reporter for *Newsweek* Magazine. The subpoena sought to compel Marro to disclose the identity of confidential informants

from whom he had obtained information which he used in an article he wrote for the August 16, 1976, issue of *Newsweek*. The article dealt with the methods used by the DEA to obtain custody of narcotics fugitives in order to bring them to trial in the United States. It contained a picture of Orsini but mentioned neither him nor his case. Appellant Orsini's appendix, twenty-second page; *United States* v. *Orsini, supra*, 424 F. Supp. at 230.

Through his lawyer, Orsini stated that he was seeking the information so that he could present testimony allegedly establishing that the circumstances surrounding his arrest in Senegal constituted a deprivation of due process. Specifically, Orsini sought from Marro documents and testimony concerning two subject matters appearing in the article: *first*, the identity of "U.S. Officials [who] privately tell the story of how the Government of Paraguay was threatened with the loss of American aid unless it extradicted one Auguste Ricorde" and *second*, the identity of "one federal official who said, 'Clearly, we have paid for some of these people. It might not have been a specific *quid pro quo*, but we would give x dollars or x cases of ammunition to officials who helped get these people on planes.'" *United States* v. *Orsini, supra*, 424 F.Supp. at 230.

Reporter Marro moved to quash the subpoena on three grounds. He contended first that the information which Orsini was seeking was immaterial and irrelevant to the issues to be decided at the *Toscanino* hearing. He also argued that the information sought was privileged under the First Amendment to the Constitution of the United States and also under New York's Newsman's Shield Law and Article I, Section 8 of the Constitution of the State of New York. *United States* v. *Orsini, supra*, 424 F. Supp. at 230.

After hearing argument, the court granted the motion to quash the subpoena. The judge concluded that under *Toscanino* and its progeny it was not enough for a defendant to show that foreign officials were bribed by American agents. Rather, in order for the defendant to prevail in a *Toscanino* hearing, the court determined, he had to establish that he was subjected to cruel or inhuman treatment by or at the direction of American officials or agents. Thus, Judge Bramwell agreed that the information which Orsini was seeking was irrelevant. At the same time, the court rejected the argument that the First Amendment stands as an absolute prohibition against compelling a newsman to disclose his sources. Rather, it was concluded that in each case there had to be a balancing of the competing interests of the newsman's claim to First Amendment protection, as against the defendant's claim to a fair trial, as guaranteed by the Sixth Amendment. Weighing these interests in the context of the case before it, the court ruled that the balance was "decidedly in favor of protecting the confidentiality of Mr. Marro's sources, inasmuch as the information sought is totally irrelevant and immaterial to the *Toscanino* issue [before the court]." *United States* v. *Orsini*, *supra*, 424 F. Supp. at 232.[7]

Following the denial of his motion, Orsini pled guilty. Thereafter, he was sentenced, and this appeal followed.

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[7] It was thus unnecessary for the court to reach Marro's claims of privilege under New York law.

ARGUMENT

POINT I

The District Court Correctly Denied The Motion To Dismiss The Indictment.

Citing *United States* v. *Toscanino*, *supra*, 500 F.2d 267; *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62 (2d Cir. 1975); and *United States* v. *Lira*, 515 F.2d 68 (2d Cir. 1975), Orsini argues that the district court erred in denying his motion to dismiss the indictment. In so doing, he contends that "[t]he Government secured his presence in the [Eastern District] through the use of deliberate, unnecessary and unreasonable conduct amounting to a patent violation of due process principles." Brief, at page 20. We respectfully submit that the claim is totally without merit. Orsini has both ignored the facts of the case and misconstrued the relevant law.

Central to a resolution of this appeal is an understanding of the cases upon which Orsini relies. We begin with *United States* v. *Toscanino*. In that case, Toscanino, a citizen of Italy, was convicted of violating the federal narcotics laws. On appeal, he challenged neither the sufficiency of the evidence nor the conduct of the trial. Rather, he contended, as he had prior to trial, that the proceedings against him in the Eastern District of New York were void because his presence within the jurisdiction of the court had been illegally obtained. Specifically, Toscanino stated that he was prepared to prove the following:

In early January of 1973, Toscanino was lured from his home in Montevideo, Uruguay, knocked unconscious and kidnapped by elements of the Uruguayan police, acting at the behest of the United States Government. He was then spirited across the Brazilian border and turned

over to a group of Brazilians, who were also acting at American direction. From the border, Toscanino was taken to Porto Alegre, where he was held incommunicado for eleven hours and denied food and water and contact with either a lawyer, his family or the Italian Consulate. Toscanino was then brought to Brasilia, where he was interrogated and subjected to brutal torture for seventeen days, during which time he was fed just enough food to keep him alive. A portion of the interrogation was conducted by an agent of the Bureau of Narcotics and Dangerous Drugs. On January 25, 1973, Toscanino was taken to Rio de Janeiro, where he was drugged by Brazilian-American agents and placed on a Pan American flight to the United States.

In addition to the above, Toscanino offered to prove that at no time did the United States Government make either a formal or informal request to the Government of Uruguay that he be extradicted. Indeed, Toscanino asserted that the Uruguan Government claimed that it had no knowledge of his abduction and that it strongly condemned the action as being against its laws. Finally, Toscanino also contended that during the seventeen day period when he was being held in Brasilia the United States Government was being given reports as to the progress of his interrogation and torture. *United States* v. *Toscanino*, *supra*, 500 F.2d 267, 269-270.

On appeal, it was held that Toscanino had alleged a violation of due process which, if proved, would require that the district court divest itself of jurisdiction over him. In reaching its decision, this Court recognized the rule of law known as the *Ker-Frisbie* doctrine, which was relied upon by the government in *Toscanino*. That rule, which developed in a line of cases from *Ker* v. *Illinois*, 119 U.S. 436 (1886), to *Frisbie* v. *Collins*, 342 U.S. 519 (1952), states that the manner in which a tribunal acquires jurisdiction over a defendant does not affect its

power to proceed. The *Toscanino* court saw *Ker-Frisbie* as setting forth a concept of due process "limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant." *United States* v. *Toscanino*, *supra*, 500 F.2d at 272. In some cases, the court concluded, where jurisdiction was obtained through an illegal act, "the effect [of the rule] could be to reward police brutality and lawlessness." *Id.*

Toscanino, however, viewed *Ker-Frisbie* as having been eroded by those Supreme Court decisions which stand for the proposition that the government must be denied the use at trial of the fruits of its own misconduct. *United States* v. *Toscanino*, *supra*, 500 F.2d at 272-273, citing *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Miranda* v. *Arizona*, 384 U.S. 436 (1961); *United States* v. *Russell*, 411 U.S. 423, 430-431 (1973), and, in particular, *Rochin* v. *California*, 342 U.S. 165 (1952). Thus, the court determined that where "the restricted version" of due process embodied in *Ker-Frisbie* conflicts with the "expanded and enlightened interpretation [of due process] expressed in more recent decisions of the Supreme Court," the *Ker-Krisbie* version must yield. *Id.* at 275.

Applying the foregoing reasoning to the facts before it, the court held that if Toscanino could establish his claims of abduction and torture, the judgment of conviction would have to be vacated and the indictment against him dismissed. The court based its holding on the determination that due process requires that a court divest itself of jurisdiction over a defendant where the jurisdiction was acquired "as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *United States* v. *Toscanino*, *supra*, 500 F.2d at 275.[8] The case

[8] As an alternative ground for its ruling the court cited its supervisory power over the administration of criminal justice in the district courts within its jurisdiction. *Id.* at 276.

was thus remanded to the district court to give Toscanino an opportunity to offer credible evidence that the action against him was taken by or at the direction of American officials.[9]

The next case in the *Toscanino* trilogy was *United States ex rel. Lujan* v. *Gengler*, *supra*, 510 F.2d 62. There, the defendant Lujan was indicted in the Eastern District of New York on July 19, 1973, for his participation in a wide-ranging international narcotics conspiracy. Following his indictment, a warrant was issued for Lujan's arrest. Thereafter, in October of 1973, Lujan was lured by a ruse from his place of hiding in Argentina to Bolivia.[10] Upon his arrival in Bolivia, Lujan was immediately arrested by Bolivian police, who were not acting at the direction of their own superiors or government but as paid agents of the United States. Lujan was not permitted to communicate with the Argentine Embassy, an attorney, or any member of his family. Five days after the arrest, Bolivian police and American agents took Lujan to the La Paz airport, where he was placed on a plane bound for New York. Upon his arrival in the United States, he was formally arrested and arraigned on the indictment. At no time

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[9] The court clearly recognized that Toscanino would only have a cognizable claim if he could establish that any mistreatment which he suffered was at the behest of American agents or officials. *Birdsell* v. *United States*, 346 F.2d 775, 782 (5th Cir.) (per Friendly, *C.J.*, sitting by designation), *cert. denied*, 382 U.S. 963 (1965).

On remand, when Toscanino was unable to come forward with evidence supporting his claims, his motion to vacate the judgment of conviction and to dismiss the indictment was denied. No further appeal was taken. *United States* v. *Toscanino*, 398 F.Supp. 916 (E.D.N.Y. 1975).

[10] Lujan was a licensed pilot. He was hired in Argentina by one Duran for the flight to Bolivia. Duran, who at the time was acting at the direction of American agents, represented to Lujan that he wished to fly to Bolivia to transact some business with American interests in Bolivian mines.

was Lujan formally charged by the Bolivian police, nor was any extradition request lodged by the United States. Significantly, Lujan made no allegation that he had been tortured or otherwise mistreated by the Bolivians or the Americans. When the district court dismissed Lujan's petition for a writ of habeas corpus, filed on *Toscanino* grounds, Lujan appealed. *United States ex rel. Lujan* v. *Gengler*, *supra*, 510 F.2d at 63-64.

On appeal, Lujan's attempt to extend *Toscanino* to the facts of his case was squarely rejected. Writing for the court, Chief Judge Kaufman pointed out that there was no intention in *Toscanino* "to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court." *United States ex rel. Lujan* v. *Gengler*, *supra*, 510 F.2d at 65. Indeed, Judge Kaufman continued, *Toscanino* could hardly be construed as eviscerating the *Ker-Frisbie* rule, a doctrine which the Supreme Court itself has reaffirmed, *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975), and which a majority of the circuits have continued to follow. *United States ex rel. Lujan* v. *Gengler*, *supra*, 510 F.2d at 65 n.4. Instead, noting that the "twin pillars" of *Toscanino* were *Rochin* v. *California*, *supra*, and *United States* v. *Russell*, *supra*, Judge Kaufman explained that the *Frisbie* rule only yields in those situations where there is government conduct of the most shocking and outrageous character. In *Rochin*, for example, an enemetic solution was forced through a tube into a defendant's stomach to recover two morphine capsules which he had swallowed. Justice Frankfurter's opinion reversing the conviction referred to the actions of the police as conduct which was such as to "shock the conscience" and to "offend a sense of justice." *Rochin* v. *California*, *supra*, 342 U.S. at 172-173. It was, Judge Kaufman concluded, conduct of this kind which the court found in *Toscanino* and which compelled the result in that case. *United States ex rel. Lujan* v. *Gengler*, *supra*, 510 F.2d at 65.

Measuring the facts of Lujan's case by the above standard, the court held that Lujan had failed to assert a viable *Toscanino* claim. Lujan had made no allegation of torture or mistreatment, nor was there any contention that the United States Attorney was aware of the abduction or of any interrogation. The court also rejected the argument that Lujan's abduction violated the charter of the United Nations and the Organization of American States. In this regard, Judge Kaufman distinguished *Toscanino*, where it was alleged that Uruguay protested Toscanino's kidnapping. In *Lujan*, however, there was no claim that either Argentina or Bolivia had in any way protested or even objected to Lujan's abduction. Judge Kaufman pointed out that this omission was "fatal to [Lujan's] reliance upon the charters," *United States ex rel. Lujan* v. *Gengler*, *supra*, 510 F.2d at 67, for treaty provisions are designed to protect the sovereignty of states. And it is only the offended state which may assert rights under a treaty or protest violations of a charter. *Id.*

In short, Lujan's claim failed because he did not allege that "Argentina or Bolivia protested his abduction or that the abduction involved abuse of the type condemned in Toscanino." *United States ex rel. Lujan* v. *Gengler*, *supra*, 510 F.2d at 68.

The next case to come after *Lujan* was *United States* v. *Lira*, *supra*, 515 F.2d 68. There, the defendant Rafael Lira, whose true name was Rafael Mellafe, appealed his narcotics conviction in the Southern District of New York. The sole issue presented on appeal was Mellafe's attack on the district court's denial of a *Toscanino* motion to dismiss the indictment.

At the evidentiary hearing Mellafe testified that he was arrested at his home in Santiago, Chile, by Chilean police on March 7, 1974. Thereafter, he was taken to a local police station where he was tortured and inter-

rogated. During this ordeal, Mellafe said, he heard English being spoken. Four days later, Mellafe was brought to the Chilean Naval Prison at Valparaiso, where he was held for three more weeks and beaten and tortured. Eventually, on May 3, 1974, Mellafe was taken before the Chilean Naval Prosecutor, where, he testified, he was forced to sign a decree expelling him from Chile. Mellafe also testified that at that time his picture was taken and given to some Americans and that outside the prosecutor's office he saw two individuals who were identified to him by a fellow prisoner as DEA Agents Charles Cecil and George Frangulis. According to Mellafe, the next day he was taken to the airport, given some pills by someone he thought to be an American physician and placed on a plane with Agent Cecil and eight Chilean policemen. He was then flown to the United States, where he was arrested upon arrival. *United States* v. *Lira*, *supra*, 515 F.2d at 69-70.

Agent Cecil testified that Mellafe had been arrested at the request of the DEA and that the United States Government had requested an expulsion order. He acknowledged that the DEA had received a report of Mellafe's arrest, but stated, however, that the first time he saw Mellafe was when he was placed on the airplane in Santiago. He also testified that neither he nor Frangulis received any reports from the Chilean police concerning Mellafe after his arrest, other than infrequent advice as to his whereabouts. He further testified that the DEA was in no way involved with the investigation conducted by the Chilean police. *United States* v. *Lira*, *supra*, 515 F.2d at 70.

Faced with these facts, this Court affirmed the district court's denial of Mellafe's *Toscanino* motion. Judge Mansfield pointed out that "[e]ssential to a holding that *Toscanino* applies is a finding that the gross mistreatment leading to the forcible abduction of the defendant was perpetrated by representatives of the United States

Government." *United States* v. *Lira*, *supra*, 515 F.2d at 70. The court noted that the *Toscanino* hearing had produced no proof that United States agents or officials either participated in or instigated the torture of which Mellafe complained. The court also rejected Mellafe's contention that since the DEA requested his expulsion, it was 'vicariously responsible' for his mistreatment at the hands of the Chileans. The United States Government had merely requested that the Chileans arrest and expel Mellafe. Mellafe's argument had to fail, Judge Mansfield wrote, because the DEA could hardly be expected to monitor the conduct of representatives of each foreign government to make sure that requested extraditions and expulsions were carried out in accordance with American constitutional standards. Finally, in disposing of Mellafe's claim that the expulsion violated Chilean law, the court noted, citing *Lujan*, *supra*, that Chile had neither objected to, nor protested, the alleged actions of its own agents. Id. at 71.

Lujan and *Lira* thus make it clear that a defendant has not asserted a viable claim under Toscanino, where he fails to establish, at the very least, either that he was subjected to *Toscanino* type treatment at the hands or behest of American agents or that the country from which he was expelled protested or objected to the manner of his removal. We submit that this is precisely the situation in which Orsini finds himself.

After the hearing below, the district court found--and those findings are fully supported by the record--that Orsini was not tortured or subjected to inhumane treatment by anyone, either American or Senegalese. *United States* v. *Orsini*, *supra*, 424 F. Supp. at 235. More importantly, however, as the record shows and as Judge Bramwell concluded, the expulsion of Orsini from Senegal was in all respects proper. Orsini was provisionally arrested in Dakar under the lawful authority of the Senegalese Government only after a request from

the American Embassy for either extradition or expulsion. Thereafter, his case was considered by the court in Senegal. And, when it was ruled that he could not be extradicted, the Senegalese Government made arrangements to expel Orsini, by placing him in the custody of Agents Bocchichio and Collier at the Dakar airport on August 25, 1975. The record shows that at no time was any more force than necessary used to effect the arrest and expulsion of Orsini. Moreover, no protest was ever lodged with the United States by either the Republic of France or Senegal in connection with Orsini's departure from Dakar. In short, the circumstances here are far less favorable to Orsini than the facts in *Lujan* and *Lira* were to their respective defendants. And, in each of those cases, on more favorable facts, *Toscanino* claims were rejected.

Indeed, the sole basis for Orsini's *Toscanino* argument appears to be nothing more than the bald conclusory assertion that his arrest and expulsion constituted "the corruption of the internal processes of the Senegalese Government." Brief, at page 22. Quite simply, there is nothing in the record to support this claim. In fact, and much to the contrary, the district court found that Orsini's arrest and expulsion were "sovereign and legitimate acts of the Senegalese Government." *United States* v. *Orsini*, *supra*, 424 F. Supp. at 235. Moreover, *Toscanino Lujan* and *Lira* all make it clear that an allegation of "corruption" of a government's "internal processes" does not rise to the level of a cognizable *Toscanino* claim. We respectfully submit that Orsini's due process argument is frivolous.

POINT II

The District Court Properly Quashed The Subpoena To Reporter Anthony Marro.

Orsini contends that the district court erred in quashing his subpoena to *Newsweek* reporter Anthony Marro. We submit that the claim is meritless. The fact is that the information sought from Marro was totally irrelevant to the issues to be determined at the *Toscanino* hearing. The district court properly exercised its discretion in quashing the subpoena.

As noted above, Orsini was seeking from Marro documents and testimony concerning two subjects appearing in the article: *first*, the identity of "U.S. Officials [who] privately tell the story of how the Government of Paraguay was threatened with the loss of American aid unless it extradicted one Auguste Ricorde" and *second*, the identity of "one federal official who said, 'Clearly, we have paid for some of these people. It might not have been a specific *quid pro quo*, but we would give x dollars or x cases of ammunition to officials who helped to get these people on planes.'" *United States* v. *Orsini*, *supra*, 424 F. Supp. at 20.

On appeal, Orsini argues that he was seeking the foregoing information in order to develop testimony that the American Government has a general policy of bribing foreign governments to induce them to turn over narcotics fugitives. Such testimony, Orsini urges, would have enabled him to show that in his case the Senegalese were nothing more than "agents" of the American Government. Orsini claims that, armed with this proof, he could have prevailed in the *Toscanino* hearing, because he would have been able to establish that "the brutalities" inflicted upon him by the Senegalese were done at the

behest and direction of the American Government. Brief, at pages 11 and 15.

Orsini is wrong on both the law and the facts. In the first place, the record is clear, and the district court found, that there were no "brutalities" inflicted upon Orsini, by the Senegalese or anybody else. *United States* v. *Orsini*, *supra*, 424 F. Supp. at 235. Moreover, as the analysis in Point I clearly shows, a valid *Toscanino* claim is only established if the defendant can show that he was subjected to cruel and inhuman treatment. There was no such treatment in this case. Thus, no due process rights of Orsini's were violated. Accordingly, there was no need in this case to determine, and it was totally irrelevant, whether or not the Senegalese were acting at the direction of the United States Government. Compare, *United States* v. *Lira*, *supra*.[11]

In addition, the information sought by Orsini would not have been relevant under any circumstances. To begin with, the *Newsweek* article did not even mention Orsini. And, like the district court, we fail to see what bearing information relating to communications between the Government of Paraguay and the Government of the United States could possibly have had on the question of Orsini's treatment in Senegal. Similarly, the statement of the anonymous "federal official" was nothing more than a general comment, which failed to mention either Orsini or his case. Furthermore, all of the Government witnesses at the hearing testified that they neither paid any bribes to the Senegalese nor pressured the Senegalese in connection with the Orsini case.

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[11] As the district court aptly observed, in and of itself, bribery would hardly amount to a cognizable *Toscanino* claim. *United States* v. *Orsini*, *supra*, 424 F. Supp. at 232.

In short, under all of the foregoing circumstances, it is clear that Judge Bramwell properly exercised his discretion when he quashed the Marro subpoena. Indeed, the ruling of the court was plainly necessary in order to prevent the hearing from becoming sidetracked on remote and totally irrelevant issues. *United States* v. *Dorfman*, 470 F.2d 246, 248 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1973).[12]

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[12] As noted above, Reporter Marro also moved to quash the subpoena on First Amendment grounds, and on the basis of New York's Newsmen's Shield Law and Article I, Section 8 of the Constitution of The State of New York. Because the district court properly ruled that the information sought by Orsini was irrelevant, we believe that it is unnecessary for the Court to reach these issues. It is appropriate to simply note, however, that when determining the validity of a claim of privilege with respect to the confidentiality of a newsman's sources, a court is required to employ a balancing test. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *In re Wolf*, 39 A.D. 2d 864, 333 N.Y.S. 2d 299 (1st Dep't. 1972). As the district court noted (424 F. Supp. at 232):

> [W]hat is required is a case by case evaluation and balancing of the legitimate competing interests of the newsman's claim to First Amendment protection from forced disclosure of his confidential sources, as against the defendant's claim to a fair trial which is guaranteed by the Sixth Amendment.

In this case, we believe that the total irrelevancy of the information sought by Orsini, together with the fact that the information was not being sought in the context of a proceeding to determine the guilt or innocence of the defendant, *compare*, *Stone* v. *Powell*, — U.S. —, 96 S. Ct. 3037 (1976), decisively tipped the scales in favor of non-disclosure of Marro's sources.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
April 14, 1977

Respectfully submitted,

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DOLORES M. BYRD being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 18th day of April 19 77 he served a copy of the within

BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

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and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M Byrd

Sworn to before me this
18th day of April 19 77

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979